Editor's note: Appealed -- aff'd, Civ.No. 85-1293 (D.Idaho July 28, 1986)

UNITED STATES
v.
HORACE CHAPMAN ET AL.

IBLA 83-987 Decided June 18, 1985

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring the Blue Mule placer mining claim to be void. Idaho 18626.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity

   Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

2. Mining Claims: Assays -- Mining Claims: Contests -- Mining Claims: Determination of Validity

   Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

APPEARANCES: Claude Marcus, Esq., Boise Idaho, for contestees; Erol R. Benson, Esq., Ogden, Utah, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Horace Chapman and Earl Chapman appeal from a decision by Administrative Law Judge John R. Rampton, Jr., dated July 27, 1983, declaring void the Blue Mule placer mining claim. This claim was located on or about May 23, 1949, by one A. L. Scott through whom appellants trace their title. 1/ The lands

1/ Government exhibit 1 is a copy of the notice of location of the Blue Mule placer mining claim. This notice, naming A. L. Scott as the sole locator, alternately recites the date of location as May 23, 1949, and July 10, 1949.

occupied by the Blue Mule claim, secs. 3, 4, 9, and 10, T. 7 N., R. 7 E., Boise Meridian, are within the Boise National Forest and are administered by the Forest Service, U.S. Department of Agriculture. At the request of the Forest Service, the Bureau of Land Management (BLM) issued a contest complaint charging as follows: "a. There are not presently disclosed within the boundaries of the placer claim materials of a variety subject to the mining laws, sufficient in quality, quantity, and value to constitute a discovery. b. The land embraced within the placer claim is nonmineral in character."

A hearing was held by Judge Rampton on September 21, 1982, at which witnesses on behalf of the Forest Service and the Chapmans testified. From this testimony the following evidence emerges. Robert C. Sykes, Jr., a geologist employed by the Forest Service and its principal witness at the hearing, examined the Blue Mule placer claim on October 25, 1978, accompanied by appellants Horace and Earl Chapman (Tr. 23). Sykes sampled the claim at each of the three visible cuts suggested by Earl Chapman (Tr. 24). A total of four samples was taken, each a cubic foot in volume. These samples were processed through a sluice box, panned to a concentrate, bagged, labeled, and sent to Union Assay Office in Salt Lake City (Tr. 24). Bedrock was encountered in three of the four samples (Tr. 24-26, 54). From Salt Lake City, the samples were sent to San Francisco where two methods were used to determine their gold content: 2/ free gold by amalgamation and fire assay. In addition, a spectrographic analysis of a composite sample was run to identify the several minerals present (Tr. 26; Gov't Exh. 5).

Using the results of the free gold by amalgamation tests, Sykes calculated the value of the gravel per cubic yard for gold:

Sample 2245	$ 1.67/cu. yd.	Sample 2246	$ 0.06/cu. yd.
Sample 2247	$ 0.04/cu. yd.	Sample 2248	$ 0.63/cu. yd.

Adjusted for the thickness of overburden above the gravel, these values became:

Sample 2245	$ 0.67/cu. yd.	Sample 2246	$ 0.03/cu. yd.
Sample 2247	$ 0.02/cu. yd.	Sample 2248	$ 0.32/cu. yd.

2/ Scott's notice of location does not identify what mineral he located his claim for. Sykes testified that Earl Chapman was asked during the examination what minerals he was claiming. "[A]s far as my memory goes," Sykes testified, "it was only gold" (Tr. 24). Chapman, however, stated that he was claiming gold, silver, and euxinite. When asked whether this information was conveyed to Sykes, Chapman responded, "I would say yes" (Tr. 7). No testimony on behalf of contestees or the Forest Service was offered as to the quantity or quality of the euxinite that may exist on the claim. As noted infra, witness Oberbillig examined the claim for silver, but did not place a value on it. See Contestees' Exh. A.

In making the above calculations, Sykes used the value of gold on March 11, 1980; that value was $ 568 per troy ounce (Tr. 29-31). Sykes estimated that approximately 27,761 cubic yards of material 3/ was present on the Blue Mule claim and the value of the gold contained in the gravel was $ 7,890.58 (Tr. 48, 75-76). Twenty percent of the claim area has been worked more than 50 years ago (Tr. 36).

A second examination of the claim took place on September 2, 1982. Sykes sampled areas evidencing new work since his first examination, panned the samples to a concentrate, and using a hand lens, noticed "no more than three colors" in each pan. Without any additional testing, Sykes estimated the value of these samples to be "somewhere around a penny a yard" (Tr. 33-34).

With respect to costs, Sykes calculated that the cost of labor and fuel alone would exceed the value of recoverable gold using a sluice-type operation (Tr. 40). In addition to these expenses, costs attributable to equipment, transportation, and reclamation would be incurred (Tr. 40). As an estimate of the reclamation costs, Sykes noted that the State of Idaho requires a $ 15,000 bond for a placer mining operation on a 10-acre tract (Tr. 76-77). In view of these cost factors, Sykes concluded that it was not possible to mine the claim at a profit.

It should be noted that an earlier report by Walter Lewiecke, a Forest Service employee, had reached a different conclusion on the basis of two examinations of the claim in November 1958. This report, parts of which were read into the record by Sykes, 4/ recited Lewiecke's view that a valid mineral discovery had been made on the Blue Mule placer and his recommendation that the claimants' surface rights be recognized (Tr. 73). On Lewiecke's first examination, panning was inconclusive. Some pans showed values of 25 cents of gold per cubic yard, but a great number of pans showed no values and lowered the average considerably. Days later, the claimant brought in a portable pump and sampling was done by small scale "hydrolyzing" and sluicing. One yard of material was sluiced averaging 30 cents per cubic yard. These values, at the $ 568 per troy ounce figures employed by Sykes, would be worth $ 4.80 per cubic yard (Tr. 73-74).

Kenneth R. James, a practical miner with over 25 years of experience in mining, testified on behalf of appellants. He stated that he had examined the Blue Mule in 1980 for a private client who was contemplating its purchase. James panned approximately 60 pans and obtained gold values averaging $ 4.24 per cubic yard (using the price of gold as of the hearing date 5/) (Tr. 85). Approximately one-third of these samples were taken at or near bedrock, an equal amount were from the topsoil, and the final one-third were from the area

3/ Throughout the hearing the term "material" seems to be used interchangeably with "gravel." Cf. Tr. 48 and 73.

4/ The Lewiecke report was never offered into evidence at the hearing.

5/ Sykes testified that the value of gold on the day prior to the hearing was $ 427 per troy ounce (Tr. 30). As noted above, the Forest Service used a gold value of $ 568 per troy ounce in making its calculations (Tr. 30).

in between (Tr. 93). From these, a single amalgamation sample was produced (Tr. 99). A split of the concentrate ("cons") produced four or five samples for fire assay. Id.

After James' pans were "weighed and worked down," they ran about 1/100th troy ounce per cubic yard (Tr. 84). A fire assay was used on the black sands and the amalgamation method produced "just a weight" (Tr. 92). No assay results or field notes comparable to contestant's exhibit 5 were available at the hearing, however, because this information had been lost (Tr. 92-93). James estimated that 100,000 yards of material were within the claim, but was uncertain whether this figure included lands previously mined (Tr. 87, 100). Gross revenues of $ 400,000 were calculated by James based on this estimate (Tr. 96). At the time of James' examination, there was apparently an asking price of $ 5,000 for the claim (Tr. 92). His client decided against purchasing the claim.

Costs of working the claim on a small scale were estimated by James to be $ 3.50 per cubic yard but, if the claim were selectively mined, the costs decreased to $ 2.50 per cubic yard (Tr. 91, 96). These estimates were based on the costs of operating a sand and gravel operation (Tr. 96). While James recognized that a gold operation involves the additional step of "cleaning" the gold, he testified that, in his view, the costs of operating a sand and gravel operation approximate the costs of a gold operation because the upper part of the topsoil is stripped, rather than washed, in a gold operation (Tr. 98). The witness admitted that a further expense would be incurred for bonding and surface restoration. Id.

On September 13, 1982, another examination of the Blue Mule was made by geologist John Oberbillig. Testifying on behalf of contestees, Oberbillig stated that he took two samples, panned each down to a concentrate, and had this concentrate fire assayed. Sample number one showed a value of $ 78 per cubic yard, and sample number two a value of $ 1.10 per cubic yard, assuming a price of gold equal to $ 400 per ounce (Tr. 112). Sample number one is "[p]robably a hot spot" according to Oberbillig, caused by the presence of a nugget (Tr. 112, 115). Each of these samples was taken near bedrock (Tr. 114). In addition, Oberbillig panned 10 or 12 pans, some of which held visible colors, some of which did not. Because of time constraints, however, no amalgamation tests were run (Tr. 115). In Oberbillig's opinion, this claim has produced a sufficient showing to encourage an ordinary miner to hold the property and work it (Tr. 113). Further exploration, testing, examination, and prospecting would be justified in the witness' view (Tr. 116).

The final witness, contestee Earl Chapman, had been associated with the Blue Mule claim since about 1955. Although Chapman had at all times intended to hold and ultimately work the mining claim, he testified that he had been too busy farming to actually commence development (Tr. 118). Chapman proposed to "ground sluice" the claim using existing ditches and the water from Edna Creek (Tr. 119). In his view, this method can produce a profit (Tr. 121). With his testimony, the hearing came to a close.

Section 1 of the Act of May 10, 1872, ch. 152, 17 Stat. 91, declares that all valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States. Section 2 provides that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. 30 U.S.C. §§ 22, 23 (1982). As has been held countless times, the discovery of a valuable mineral deposit exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). A logical complement to this "prudent man test" is the marketability test, which requires a showing that, as a present fact, there is a reasonable likelihood that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599, 600 (1968); In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983).

[1] Where, as here, the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claim. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome the Government's showing by a preponderance of the evidence. United States v. Hooker, 48 IBLA 22, 27 (1980). While, on appeal, the Forest Service suggests that the location of the subject claim in a national forest requires that a claimant establish the validity of a claim by evidence that is clear and convincing, this contention has recently been refuted by the Board. See In re Pacific Coast Molybdenum Co., supra at 32, 90 I.D. at 363. As we stated therein, the same standard of proof is required, regardless of the situs of the claim.

In the instant case, Sykes examined every cut pointed out by contestee Earl Chapman for gold content. Having obtained mineral values within the claim and calculated the quantity of material within the claim, Sykes estimated that the value of all gold in the claim would be exceeded by the costs of labor, fuel, bond, and reclamation, inter alia. 6/ We hold that this evidence of a lack of discovery established the Government's prima facie case. Moreover, contestees' failure to develop the Blue Mule over a considerable period of time independently serves to establish a prima facie case of invalidity. United States v. Hess, 46 IBLA 1 (1980).

6/ Appellants' objections to Sykes' sampling techniques are fundamentally speculative. For example, contestees suggest that none of Sykes' samples were taken at bedrock because Sykes failed to testify that the depth of the overburden varied from sample to sample. Thus, contestees conclude that if, as acknowledged by Sykes, sample 2245 was not taken at bedrock and a similar volume (1 cubic foot) was taken in each sample, Sykes missed bedrock on each sample. Sykes' actual testimony, however, was to the contrary (Tr. 24-26).

[2] The Government having established its prima facie case, it was incumbent upon contestees to overcome this showing by a preponderance of the evidence. A wide discrepancy in the value per cubic yard of the samples taken by Sykes and James is apparent in the record. The Government's exhibit 5 sets forth in some detail the results of four samples tested by three different methods: free gold by amalgamation, fire assay of tails from amalgamation, and spectrography. Contestees, however, have failed to produce a similar document and as a result must rely upon the oral testimony of James, offered some 2 years after his examination of the claim. Though it is apparent from the record that James prepared a report to his client within a few days of his examination, the selections of this report read into the record do not provide specific test results comparable to Government exhibit 5. See, e.g., Tr. 88, 89, 91. Moreover, even this report was not offered into evidence. As noted above, James testified that his field notes and assay results had been lost (Tr. 92). Such materials, James suggests, would also disclose the location of his sixty samples (Tr. 92-93). 7/ No such disability is present in the Government's case; Government exhibit 4 shows the location of its four samples.

In United States v. Arbo, 70 IBLA 244, 249-50 (1983), this Board noted that a contestee's reluctance to bring pertinent records to a hearing and his hesitancy to supplement the record to clarify crucial elements in his case cast doubt upon contestee's position. Similar doubt emerged in United States v. Ramsey, 84 IBLA 66, 72 (1984), where the contestee failed to offer records of pan amalgamation assays. James' inability to state where his samples were taken further reduces the probative value of his evidence. United States v. Burt, 43 IBLA 363, 367 (1979).

Sykes estimated 27,761 cubic yards of material; James estimated 100,000. On cross examination, however, James responded that he did not remember whether his estimate had been reduced by that yardage, amounting to 20 percent of the claim, that had already been mined. Moreover, inasmuch as James testified that he found some values in the topsoil and overburden, it is likely that his volume estimate includes not only the gravel, but the overburden as well. Based on the evidence adduced at the hearing we must conclude that appellants failed to preponderate over the Government's showing.

Neither the report of Forest Service employee Lewiecke nor the testimony of John Oberbillig causes us to alter our holding. Lewiecke's report was prepared in conjunction with a proceeding under section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1982), to determine only whether the Surface Resources Act provisions would apply to the claim. See Gov't Exh. 1. Lewiecke was unavailable to testify as to the basis of his conclusion. That portion of Lewiecke's report read into the record fails to indicate where his samples were taken other than to say that his best sample came from the "[b]anks of the old workings" (Tr. 73). In addition, no indication is given as to how Lewiecke's samples were assayed. If they were fire assayed, as were Oberbillig's, the caution imposed by BLM's Technical Bulletin 4 would apply: "[N]o credence

7/ James did testify that he tried to cover most of the property with his samples. Most of the cuts and bedrock exposures were "more to the northern end" (Tr. 92).

should be placed in placer valuations or reports that are based on the results of fire assays. Although this should be common knowledge among mineral examiners, a surprising number seem unaware that fire assaying although accurate per se yields misleading results when applied to placers." See Wells, Placer Examination: Principles and Practice, at 91; see also United States v. Ramsey, supra at 71.

Additional doubt is raised by Oberbillig's calculations. As noted above, one of Oberbillig's samples yielded a value of $ 78 per cubic yard. In post hearing pleadings, counsel for the Forest Service contended that this figure was misleading because Oberbillig added the gold and silver assay weights of this sample together and treated this weight in his calculations as being wholly gold. Judge Rampton found that this method caused an error of 28 percent, casting doubt on the weight to be given the witness' conclusions. In their statement of reasons on appeal, appellants fail to address this issue. On the basis of the entire record, we conclude that Judge Rampton correctly held the Blue Mule placer mining claim null and void as unsupported by a discovery of a valuable mineral deposit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge